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No. 94-511

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLORIDA ROCK INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly ruled that the trial court must take the post-regulatory market value of the subject property into account in determining whether a taking has occurred.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-52) is reported at 18 F.3d 1560. The opinion of the United States Claims Court (now the Court of Federal Claims)[1] (Pet. App. 57-91) is reported at 21 Cl. Ct. 161. A previous

[1] This action was originally commenced in the United States Court of Claims (Pet. App. 168). The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, abolished that court and assigned certain of its former functions to a newly created United States Claims Court. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, in turn renamed that court "Court of Federal Claims." For convenience, we will use the trial's court current name to refer to proceedings held and decisions rendered by it and each of its predecessor courts.

opinion of the court of appeals in this case (Pet. App. 92-121) is reported at 791 F.2d 893. A previous opinion by the United States Claims Court (Pet. App. 122-165) is reported at 8 Cl. Ct. 160.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1994. Cross-petitions for rehearing were denied on June 21, 1994 (Pet. App. 53-56). The petition for a writ of certiorari was filed on September 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Clean Water Act was enacted in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. 1251(a). Under Section 301(a) of the Act, 33 U.S.C. 1311(a), discharges of pollutants into the "navigable waters" are illegal, unless conditions found in other specified sections of the Act are satisfied. See 33 U.S.C. 1362(12). One of those specified sections is Section 404 of the Act, 33 U.S.C. 1344, which authorizes the Secretary of the Army—acting through the Chief of Engineers—to issue permits for the discharge of dredged or fill materials into the "navigable waters." See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

Petitioner is a company engaged in the mining, processing, and sale of crushed stone and aggregates. Pet. App. 123. In 1972, petitioner purchased for $2,964,000 a 1,560-acre tract in southern Florida. The site, which is located west of metropolitan Miami, consists of undeveloped wetlands underlain by limestone.

Petitioner purchased the tract to mine the limestone. *Id.* at 4-5, 94-95.

In October 1979, after the enactment of Sections 301(a) and 404 of the Clean Water Act, petitioner applied to the Corps under Section 404 of the Act for a permit to mine 98 acres of the 1,560-acre parcel.[2] The Corps of Engineers gave notice of the application to various federal and local agencies and instrumentalities, many of which submitted environmental objections to the application. In October 1980, the Corps denied petitioner's application, determining that the requested permit would not be in the public interest, because of the adverse environmental impacts of petitioner's proposed activities. Pet. App. 96-97, 126.

2. Petitioner did not seek judicial review of the Corps' administrative determination. Instead, petitioner brought the present action in the Court of Federal Claims, contending that the permit denial constituted a taking of the entire 1,560-acre property and seeking the payment of just compensation. Pet. App. 176.

In the liability phase of its bifurcated proceedings, the Court of Federal Claims held that the denial of the permit constituted a taking of the 98-acre tract, but not of the remainder of the 1,560 acres. The Court of Federal Claims found that rock mining was the only economically viable use of the property (Pet. App. 127) and that the proposed rock mine "would not * * * result[] in pollution of the water supply" (*id.* at 155). Following a trial on valuation, the Court of Federal

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[2] At that time, the Corps requested limestone mining firms to submit applications only for three-year permits (Pet. App. 59, 126). Petitioner did not challenge the Corps' request, and limited its application to 98 acres of the property, an estimated three years' production.

Claims concluded that just compensation for the 98 acres amounted to $1,029,000, plus interest (Pet. App. 166-167).

3. Both sides appealed. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893 (Fed. Cir. 1986) (Pet. App. 92-121). The court affirmed the trial court's determination that petitioner could have no valid takings claim for more than 98 acres of the entire 1,560-acre tract. Pet. App. 118-120. The court vacated, however, the finding that a taking of property had occurred and remanded the case for further consideration because (*id.* at 94) "[t]he trial judge failed to apply the evidence in a manner correct in all respects to determine whether he had an actual instance of a taking before him."

The court of appeals specified two errors in the analysis employed by the Court of Federal Claims. First, the court of appeals concluded that the trial court lacked jurisdiction to review the Corps' conclusion that petitioner's proposed activities would in fact cause pollution. Pet. App. 102-104. Second, the court of appeals found that the trial court also erred in failing to consider the effect of the regulatory action on the market value of the property as one of the factors bearing on whether a taking had occurred. *Id.* at 109-112. Relying upon *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986), the court of appeals stated that the factors pertinent to the ad hoc factual inquiry of whether a particular governmental action constitutes a taking include the economic impact of the regulations on the claimant, the extent to which the regulations interfere with distinct investment-backed expectations, and the character of the government action. Pet. App. 109. By disregarding the value at which the subject parcel could be resold on the existing market, the court of appeals

concluded, the trial court had failed to give proper consideration to the economic impact factor.

Petitioner sought this Court's review, contending, *inter alia*, that the court of appeals improperly had required consideration of the property's post-regulatory market's value, because that value was based on speculation that, sometime in the future, the Corps might issue a permit allowing the land to be used for mining. See U.S. Br. in Opp. at 8-9, No. 86-465. This Court denied certiorari. 479 U.S. 1053 (1987).

4. On remand, the Court of Federal Claims held a second liability trial. As in the initial trial, it was undisputed that, at the time of the alleged regulatory taking, there had existed a local real estate market in which numerous wetlands properties (which were also subject to the Clean Water Act) had been bought and sold. Pet. App. 14-15, 77-79. The government asserted that the return that petitioner could have realized by selling the subject parcel on that market must be considered in determining whether the denial of petitioner's permit application constituted a taking. The government also contended that appropriate consideration of that market would lead to the conclusion that no taking occurred. Petitioner, without disputing the existence of a market in which similar wetland properties were being bought and sold for substantial prices, maintained that that market should be disregarded, because it was dominated by speculators who were generally unaware of applicable land use restrictions (such as Sections 301(a) and 404 of the Clean Water Act). Pet. App. 11-17 & n.12.

The Court of Federal Claims accepted petitioner's argument. It ruled that because the local market was comprised of purchasers who were generally unaware of land use regulations that could impede development, that market was not a "'fair' market." Pet. App. 77-85. The

court accordingly rejected the testimony of the government's expert, who had reviewed arms-length transactions involving comparable properties and had concluded that the subject land retained a value of $4,000 per acre. *Id.* at 79-80. After finding no other economically viable use for the property, the court concluded that the subject tract retained only a nominal value of $500 per acre after the denial of the permit application. In the court's view, that diminution in value (from the $10,500 per acre pre-regulatory value), when considered with other factors, constituted a regulatory taking. *Id.* at 87-90. The court again awarded $1,029,000, plus interest, to petitioner. *Id.* at 90.

5. The government appealed, and the court of appeals again reversed and remanded for further proceedings. Pet. App. 1-52. After reiterating that "the economic impact of the regulation on the claimant" (*id.* at 10) is one of the factors that must be considered in determining whether a regulatory taking has occurred, the court found that the Court of Federal Claims erred by excluding from its analysis the value that petitioner's land could have commanded in the real estate market. *Id.* at 11-17. The court noted that "an assessor might be justified * * * [in] discarding aberrational values based upon sales between related entities or fraudulent sales to widows and orphans," but he "may not discard an *entire* market as aberrational," since "[t]he fact that many players in the market chose to disregard the immediate potential for development in favor of a longterm perspective—hardly unusual behavior in Florida's history of real estate investment—does not make the market as a whole 'aberrational.'" *Id.* at 16-17.

The court of appeals also explained (Pet. App. 13-14 & n.12) that the trial court misread the opinion rendered on the initial appeal as requiring a detailed inquiry into the

actual sophistication of market participants. It is usually appropriate, the court held, to presume that purchasers who engage in arms-length transactions have informed themselves of such legal restrictions as bear on their assessments of value. *Id.* at 14 n.12. As the court further explained, the important point is that petitioner could sell the subject property for substantial value (*id.* at 17):

> It was error to * * * requir[e] a detailed inquiry into the motivation and sophistication of the buyers of comparable parcels. Dollars are fungible; a speculative market provides a landowner with monetary compensation which is just as satisfactory as that provided by any other market. Should a landowner wish to pick and choose her buyers, that luxury is not chargeable to the federal fisc. To conclude otherwise would be tantamount to concluding that there could never be a market fueled by speculation—a conclusion at odds both with common sense and with our directions in [our previous opinion].

Finally, the court noted that the record "suggest[ed]" that petitioner's land has lost *some* value "as a result of the regulatory imposition,"[3] and directed the Court of Federal Claims to determine whether that diminution amounts to a "partial taking." Pet. App. 18-19, 25. Quoting from this Court's opinion in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), the court noted that the controlling question, as in every regulatory taking case, is whether the regulation at issue "goes 'too

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[3] The court made clear that it will be open to the Court of Federal Claims, in its discretion, to take additional evidence on that question on remand. Pet. App. 18-19 & n.15.

far'" (Pet. App. 19-20, 24) in light of the functions of the regulation, any benefits petitioner and its property may have derived from it, and other *ad hoc* factors traditionally considered by this Court's taking cases. *Id.* at 25-28. As the court of appeals put it, "[w]hat is necessary is a classic exercise of judicial balancing of competing values." *Id.* at 26.

Chief Judge Nies dissented. Pet. App. 32-52. She noted that petitioner had twice tried its case on the theory that the denial of its permit application amounted to a taking of its entire fee interest, and argued that petitioner should not now be given yet another opportunity to retry the case on a new "partial takings" theory. *Id.* at 34-36. Judge Nies also criticized the majority's "partial takings" discussion on the ground, among others, that it unduly focused on a single strand of the landowner's entire bundle of rights, rather than considering the taking question with due attention to the entire spectrum and extent of the landowner's interests. *Id.* at 47-50.

ARGUMENT

The court of appeals did not decide whether the facts of this case constitute a taking. The court of appeals merely ruled that the trial court committed a legal error in concluding that a taking had occurred, and it remanded for application of the correct legal standard and for any further evidentiary proceedings that the trial court may find necessary to apply that standard. The court of appeals was clearly correct to reject the trial court's reasoning, and there is no reason for interlocutory review of the case by this Court.

1. As the court of appeals correctly recognized, this Court's decisions establish an ad hoc approach to deciding whether regulations affecting property con-

stitute a taking and provide that one of the elements which has "particular significance" in making such determinations is the "economic impact of the regulation on the claimant." *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2290 (1993); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Thus, this Court's "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987). See also *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962).

Petitioner contends (Pet. 9-14) that a comparison of the pre-regulatory and post-regulatory values of the affected property plays no role in takings analysis where, as a result of the regulation, there is no economic "use" to which the subject land can be devoted. Petitioner's argument, however, overlooks the fact that sale of the property for substantial value constitutes an economic "use" of that property. Indeed, neither this Court's cases nor common sense requires takings analysis to isolate restrictions on the use of land from whatever effect those restrictions may have upon the land's value. As the court of appeals aptly noted (Pet. App. 17), petitioner is not entitled to claim that its land lost all economic value as a result of government regulation when post-regulation arms-length transactions demonstrate that petitioner could have sold the property for a substantial sum. Nor is petitioner entitled to obtain government funds simply by deprecating those willing to pay substantial sums for its property in arms-length transactions as "unknowing speculator[s]"

(Pet. 10), since petitioner's desire "to pick and choose [its] buyers" is a "luxury [that is] not chargeable to the federal fisc." Pet. App. 17.[4]

Nothing in *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), supports petitioner's novel takings theory. See Pet. 12. *Lucas* addressed a situation where the governmental restriction had deprived the subject tract of all of its economic use *and* all of its economic value as well. This Court expressly treated the deprivation of economic value as a key component of the takings analysis. See *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. at 2889 ("This case requires us to decide whether the [regulatory restriction's] dramatic effect *on the economic value* of Lucas's lots accomplished a taking of private property * * * requiring the payment of 'just compensation'") (emphasis added); see also *id.* at 2896 (noting that the regulation rendered the two parcels at issue "valueless"). *Lucas* therefore casts no doubt on the correctness of the court of appeals' conclusion that the post-regulatory value of petitioner's property is an indispensable element of the takings calculus.

2. Petitioner asserts (Pet. 9) that the decision below "is likely to create confusion in the area of regulatory taking law," because the court of appeals "embark[ed] on a new and uncharted course by holding that 'partial takings' are compensable at a rate less than the value of the fee." We agree that the court's references to "partial

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[4] Petitioner is wrong to argue that the court of appeals' analysis "would eviscerate the Fifth Amendment[]," because there always will be speculators willing to gamble that regulatory restrictions will be lifted. Pet. 10. The court of appeals did not hold that the existence of a market based on speculation completely forecloses a takings claim. It simply held that it is *relevant* to the inquiry to know how much money arms-length purchasers would be willing to pay for the regulated property.

takings" are unfortunate and that, if misread, they could create confusion.[5] In particular, to the extent the court's opinion is read as suggesting that regulations that result in a partial diminution of economic value should be equated with a governmentally compelled physical occupation of a portion of a landholding (see Pet. App. 22-23), that suggestion would be wrong.[6]

As we have indicated, however, the bulk of the court of appeals' discussion of the proceedings to be held on remand appears to contemplate that the balancing approach dictated by this Court's cases will be followed. Pet. App. 25-28, 30, 32. Thus, any misunderstanding that might be generated by the court of appeals' opinion may become dissipated when the lower courts ultimately reach a definitive resolution of the takings issue in this proceeding. The mere possibility that such a misunder-

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[5] The term "partial taking" is a misnomer whose use does not promote clarity in regulatory takings cases. As this Court pointed out in *Concrete Pipe*, 113 S. Ct. at 2290:

> [A] claimant's parcel of property [can]not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

[6] Unlike regulatory actions, the takings consequence of governmentally compelled permanent physical occupations of land is not dependent on the effect of that occupancy on the balance of the parcel. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred."). Where no physical occupation is involved, however, the takings analysis will take into consideration the effect of the regulatory imposition on the "parcel as a whole." *Penn Central*, 438 U.S. at 131; see also *Concrete Pipe*, 113 S. Ct. at 2290.

standing might occur is not the type of "extraordinary inconvenience and embarrassment," *American Constr. Co.* v. *Jacksonville, T. & K. Ry.*, 148 U.S. 372, 384 (1893), that should counsel review of this case in its current interlocutory posture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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